Two questions arise for decision. The first is whether on the true construction of the Ordinance the father's refusal can be over-riden and the second is whether in the circumstances of this case the Court is satisfied that the father's refusal "ought not to obstruct the issue of the certificate" [Section 38 (2)].

As regards the construction of the Ordinance the point is not free from difficulty, as there is an apparent inconsistency between section 8 which provides that where a consent is necessary and such consent other than that of the father, is withheld without just cause, the parties to the intending marriage may petition the Supreme Court and such court may examine the allegation in the petition, and if such marriage appears proper the Supreme Court shall declare such marriage to be a proper marriage. Section 8 falls under Part II of the Ordinance which is headed "Consents," and deals with consents generally, whether the marriage is to be performed by a Minister of Religion or otherwise. *Prima facie* therefore the father has an absolute right of veto. Sections 7 and 8 of the Ordinance correspond with Sections 16 and 17 of the English Marriage Act of 1823. These sections have in England been repealed by section 9 of the Guardianship of Infants Act 1925. As regards section 38 of the Ordinance this corresponds with section 13 of the Marriage Act of 1836 which legalised civil marriages in England. By virtue of the provisions of section 38 (2) of the Ordinance the refusal of "any person whose consent is required" can be over-ruled by the Marriage Registrar "if he is satisfied that it ought not to obstruct the issue of the certificate" and section 39 gives the parties the right to petition the Supreme Court against the Marriage Registrar's refusal to issue the certificate. It is to be noted that sections 38 and 39 come under Part VI of the Ordinance which is headed "Marriage solemnized by or in the presence of Marriage Registrar," and under section 38 the refusal of the father is treated on the same basis as the refusal of any other person whose consent is required under section 7.

On reading the Ordinance as a whole I think it is clear that the procedure indicated in section 8 is limited to the case of marriages solemnized by a Minister of Religion, whereas section 38 governs the procedure in the case of marriages solemnized by the Marriage Registrar. This view is supported by section 19 of the Ordinance which prohibits a Minister of Religion from solemnizing a marriage if it is prohibited by any one whose consent is required under section 7. He cannot issue the certificate "until he is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition." In the case of a marriage of a minor by a Minister of Religion not only the father but any guardian can prohibit the marriage, although under section 8 the refusal of any guardian other than the father can be over-ruled by the Supreme Court.

In the case of civil marriages, however, the Marriage Registrar has not, like a Minister of Religion, to consider merely whether the person prohibiting the marriage has lawful authority for so doing and what he has to consider is whether the protest of the guardian "ought to obstruct the issue of the certificate." These words are not qualified in any way and obviously give him a very wide discretion. I conclude therefore that in a civil marriage the Marriage Registrar can disregard the protest even of the father in a proper case.

Then as to whether or not this is a proper case for the courts to interfere, the court in exercising its discretion must of course consider the interests of the parties free from any denominational prejudice. The High Court, inheriting as it does the jurisdiction of the Court of Chancery in England, is especially charged with safeguarding the interests of infants. In considering the facts of this case from this point of view there can be little doubt that it is of paramount importance to the minor that this marriage should take place, and I have little doubt that the Marriage Registrar would have come to the same conclusion but for the difficulties of construction arising upon the Ordinance itself. I therefore direct the Marriage Registrar to issue the certificate required by section 36.

Petition allowed.

Solicitors for the Applicant—*Mallal & Namazie.*

Solicitors for the Respondent—*Shelley-Thompson & Demuth.*

[APPELLATE CIVIL JURISDICTION]
MURISON, C.J., THORNE & MUDIE, JJ.
January 14, 1930.

TAN SOO LOCK

v.

TAN JIAK CHOO AND ANOTHER.

[SINGAPORE CIVIL APPEAL No. 26 of 1930]

The principles on which costs will be awarded against or to Defendant-Trustees, discussed and applied.

Per Thorne J. Trustees have a right to prefer an appeal to the Court of Appeal on the question of costs only (without leave) notwithstanding the provisions of Section 1123 of the Civil Procedure Code (now Section 22 (1) of the Courts Ordinance 1934).

Appeal to the Court of Appeal, consisting of Sir William Murison, C.J., Thorne, J., and Mudie, J.

The facts and arguments are fully set out in the Judgment of Thorne, J.

Eber and *Stuart* for Plaintiff.

John Laycock for 1st Defendant.

Williamson for 2nd Defendant.

Cur. Ad. Vult.

MURISON, C.J.—I have had the opportunity of reading the judgment of Thorne, J. in this appeal. I agree with the conclusions at which he arrives and the reasons by which he arrives at them.

An appeal in the matter of costs can be dealt with either on a general view of the whole case (as is stated in a recent judgment of Lord

Birkenhead which I cannot give the reference to at the moment) or in separate parts, if the case lends itself naturally to a division. This case, I think, comes under the latter category, and it was argued upon that basis before us.

I would like to add a few words to what is said by Thorne, J. It is clear from the cases cited that trustees can be deprived of their costs only upon the ground of misconduct, and some cases, which are apparently still good law, go to surprising lengths in the preservation of trustees' rights in respect of costs. Most of these cases seem to rest upon the unexpected principle that trustees are to be tenderly dealt with because they were not paid for their work, and were subject to serious liabilities, the result being that trustees were not easy to obtain because their position was gratuitous and onerous. In recent times the Judicial Trustees Act of 1896, the 1929 provisions (at any rate in this Colony) for the remuneration of Trustees, and the establishment (in England) of a Public Trustee would seem to cut away to a great extent the basis of these cases which preserve the rights of trustees in the surprising way to which I have referred. However, it would appear that the law remains the same and all we can do is to follow it. In favour of the Trustees it is to be remembered that the whole administration of the trust took place before the 1929 Ordinance became law in the Colony.

For these reasons, although I would much prefer a stricter view of the liability of trustees to be deprived of their costs, I agree with the judgment of Thorne, J. in this appeal.

THORNE, J.—This is an appeal against the judgment on further consideration of this suit dated the 3rd September, 1930, whereby the defendants were ordered to pay the party and party costs of the action.

The respondent here, the plaintiff in the action, was a pecuniary and a residuary legatee under the Will of one Tan Jiak Yam which bears date the 28th September, 1897. Tan Jiak Yam to whom I will refer as "the testator," died on the 27th December, 1903, and probate of his will was granted on the 30th of May, 1904 to the original defendants in this suit, that is to say, Tan Jiak Choo and Chan Chai Eng Neo. The respondent attained his majority on the 30th October, 1912. Between that date and the end of the year 1919 the respondent received sums of money from the executors of the testator's will by way of advances, and on the 30th December, 1919 the first appellant is alleged to have produced to him certain accounts purporting to set forth the account of the administration of the testator's estate, which showed a balance in favour of the respondent of the sum of $43,001.30. The respondent signed this account, and a receipt for that sum, which was thereupon paid to him. Thereafter the Plaintiff consulted a solicitor and correspondence ensued between that gentleman and the solicitors for the executors, which appears on pages 37 to 41 of the record. This correspondence lasted nearly a year. The demands made on behalf of the respondent were reasonable and proper, and by letter of the 9th April, 1921 the executors replied that they were not prepared to discuss the matter further. The respondent thereupon issued a writ claiming administration dated the 7th June, 1921. By the statement of claim delivered on the 9th November, 1921 the respondent alleged against the executors acts of breach of trust and/or wilful default. He claimed an account against the executors on the footing of this default.

The executors filed separate defences, and each counterclaimed against the respondent the sum of $13,000 as having been overpaid to him.

The suit came on for trial on the 19th day of July, 1922, and accounts were ordered to be taken as ordinary administration accounts, not on the footing of wilful default, and the question of costs was reserved.

The litigation was unduly protracted, but it is unnecessary for the purpose of this appeal for me to trace its history in detail.

The suit came on upon further consideration on the 9th day of August, 1930 when two questions only appear to have remained for disposal. These were (a) the costs of the action, and (b) how the sum of $1,525.05 standing in Court to the credit of the suit should be dealt with. I should here state that the defendant Chan Chye Eng Neo died *pendente lite*, and by order of the 6th April, 1923 the second appellant was substituted a defendant as the executor of her will and thus derivative executor of the will of the testator.

I will hereafter refer to the original defendant and such substituted defendant as "the appellants."

The judgment on further consideration adjudged that the respondent do recover against the appellants his costs of the action to be taxed, and that the sum of $1,525.05 be paid to the plaintiff in part payment of his costs. From that judgment the appellants preferred an appeal. At the hearing of the appeal counsel for the appellants contended that the learned Judge exercised his discretion wrongly in ordering the appellants to pay the respondent's costs, and urged upon us that the respondent should be ordered to pay the appellants' costs. In any event it was urged that the judgment with regard to the sum of $1.525.05 standing in Court to the credit of this suit was wrong.

It must be remembered that the judgment appealed from was made on further consideration when no oral testimony was adduced, and this Court is therefore in just as good a position to form an opinion on the facts as disclosed by the record, and as to the propriety of the conduct of the parties, as was the learned Judge below.

In substance this appeal is an appeal on the question of costs only and I at first thought that

the provisions of section 1123 of the Civil Procedure Code applied, and that no appeal lay to the Court of Appeal without leave. In this instance the appellants obtained leave, but since the question has been raised in this appeal, I think it proper to express the opinion that I am satisfied in such a case as the present the appellants have a right to prefer an appeal to the Court of Appeal on the question of costs only notwithstanding the provisions of section 1123.

(See Order 65, Rule 1 of the 1931 Edition of the White Book, and the notes thereto, and Order 58, Rule 1. Note: "Appeals with leave only. B" page 1219 of the same book).

For the purpose of this judgment I divide the history of the litigation into two periods, the first up to and including the order for accounts of the 19th July, 1922, and the second since that order. By this order costs to that date were reserved, and it was therefore open to the learned Judge below to deal with these costs on further consideration.

(See the same Edition of the White Book page 1404. Note: "Reserved costs," and the case of *Re Gardner*; *Roberts* v. *Fry*, 1911, W. N. page 155).

As to the first period the learned Judge held that the appellants had no sort of justification for their refusal to render proper accounts before action brought, and in this finding I heartily concur. The conduct of the original defendants in refusing to discuss the questions properly raised in correspondence was a breach of their duty, and their attitude obstinately defiant and unreasonable, and I agree with the learned trial Judge that such conduct on their part was the direct cause of the respondent bringing his action. It was urged upon us for the appellants that while it might be said with truth that their so doing was the proximate cause of the suit being brought, yet they ought not to be called upon to pay all the costs down to the order of the 19th July, 1922 for the reason that the respondent, having endorsed his writ for an account could have come to the Court in a summary way and asked for the usual form of order in an administration suit on the ground that there was no preliminary question to be decided, and that the costs were increased considerably by the respondent having alleged acts of wilful default. I am unable to agree with this view. It seems to me that the conduct of the executors at that date was such as to rouse the suspicion of the respondent. During the correspondence no allegation of wilful default was made. The writ was issued on the 7th June, and the statement of claim delivered on the 9th November following. I am unable to find from the record, and it has not been explained at the Bar, what happened in that interval, but it is quite clear, in view of the allegations in the statement of claim, that the respondent acquired information in the interval which was not referred to in the correspondence before action brought, and in my view it was not unreasonable for the respondent in the circumstances to be suspicious that the appellants had not been frank with him, and that they had some very good reason for not complying with his reasonable demands for accounts. In my view the appellants were entirely responsible for the action being brought against them by their improper and unreasonable conduct before action was brought, and the order of the learned Judge below that they do pay the costs of the respondent up to and including the order of the 19th July, 1922 was right, and should be affirmed.

I now proceed to consider the costs of the action after the 19th day of July, 1922. Now on this the learned Judge held that:—

(1) The original defendants kept most inadequate accounts which resulted in prolonging the enquiry by the Registrar.
(2) They failed to invest the balances in their hands as they should have done.
(3) They credited the estate with too low a rate of interest.
(4) They charged the estate too highly for their services.
(5) Notwithstanding all these irregularities that they were not very seriously in default to the estate.

With regard to these matters, as to No. (1) I concur.

As to No. (2) I also concur, and I think further that the conduct of the appellants during the course of the enquiry was extremely unsatisfactory, because it seems to me that the person who retains balances in hand should, of all people, be able to explain whether those funds were invested, and if so, how, and if not invested, where the funds were kept. It is true that the respondent was unable to establish as a substantive proposition that the appellants had in fact invested the balances from time to time remaining in their hands, or that they had used those balances for their own purposes in any way, but notwithstanding that I still think the appellants at fault in their conduct during the litigation: it was unsatisfactory; and calculated to raise suspicion in the minds of the respondent's advisers.

As to No. (3), it is true that the appellants credited interest at the rate of 4 per cent, and in the result a rate of 5 per cent was allowed, but, in view of the fact that this question was not settled until the judgment of the Court of Appeal established the rate of interest in such cases in this Colony I do not think much stress should be laid upon this point but I do think that the accounts were in such a form that the respondent and his advisers would be entirely unable to say whether the amounts credited for interest were correct by reason of the paucity of information furnished by the accounts.

As to No. (4), the appellants deducted a sum of $5,000 by way of commission on their services without authority, and their doing so was irregular, but on a subsequent application the learned Chief Justice awarded to the appellants a sum of $2,000 by way of commission, (See the order of the 31st March, 1930).

As to No. (5), I agree. It was stated from the Bar on the hearing of this appeal that the accounts filed in this suit were in the same form, except as to the sum of $5,000 deducted by way of commission, as those rendered to the respondent before action brought, and it was urged upon us that in the result the accounts of the appellants were substantially correct; but it must be remembered that the appellants themselves by their defence counterclaimed against the respondent $13,000 as having been overpaid to him. This claim was apparently not pressed by the appellants at a late stage of the enquiry, but it is to be observed that their own attitude at the commencement of the enquiry was that their accounts were wrong to the extent of their claim to recover from the respondent $13,000 out of a total of $43,000.

The rule of law with regard to the costs of trustees and executors is that they are entitled to their costs out of the estates as a matter of course if they account fairly, and, the costs being part of the general indemnity to which trustees and personal representatives are entitled, the Court will order their costs to be taxed as between solicitor and client. This rule is recognised by the provisions of Order No. 65 Rule 1. I have examined a number of cases with the object of ascertaining the principle which guides the Courts in departing from that rule. It would appear that if a person in the situation of a trustee is guilty of misconduct either in the administration of his trust, or in the conduct of the cause, costs may be ordered to be paid by the trustee.

It would further appear to be the rule that where a trustee has been guilty of corrupt or fraudulent conduct it is the invariable practice of the Court to order the trustee to pay costs personally. The cases indicate that the Court may visit upon the trustees the whole of the costs of the action, or part only of the costs, or may merely deprive the trustee of his costs.

I have attempted but find it extremely difficult to state the principle upon which the Court acts in determining whether on the one hand merely to deprive a trustee or executor of his costs, or, on the other, to order an executor or trustee to pay the costs in whole, or in part. It would appear that the order as to costs made by the Court in the various cases differs according to the view which the Court takes of the conduct of the trustees or executors in their administration of the trusts, or in their conduct during the cause. The misconduct may consist in either misfeasance or nonfeasance, but once misconduct as a trustee or executor has been established the costs are entirely in the discretion of the Court.

[See *Charles* v. *Jones*, (1886) 33 C.D. 80, *Re Beddoe*, (1893) 1 Ch. page 547. *Easton* v. *Landor*, (1892) 62 L.J. Ch. page 164]

I am satisfied in this case that the learned Judge was right in his conclusion that the original defendants were guilty of misconduct as executors; that the accounts filed by the appellants in this suit were incomplete and unsatisfactory but their conduct has not resulted in any loss to the estate, nor has it been established that their motives were in any way corrupt. With great respect to the opinion of the learned Judge below, I think that this case so far as concerns the costs incurred during what I have described as the second period does not fall within the category of cases in which the Court visits upon executors the penalty of paying costs. At the same time I think the conduct of the appellants has been such as to disentitle them to their costs of the action, and I think that the order of the learned Judge should be reversed in this particular, and the order should be that as from the order of the 19th day of July, 1922 each party to the action do pay his own costs.

During the argument two questions of detail were raised, namely, as to the costs of the applications to decide what rate of interest was proper to be allowed, and as to whether or no the appellants were entitled to commission, and if so, of what amount.

As to the first of these matters, it was necessary to apply to the Court to fix the rate of interest, and in view of the state of law at the time it was reasonable that the appellants should take the ruling of the Court.

On the hearing of the application the learned Chief Justice reserved the costs of that application until the further consideration of the action. This matter was therefore open under the rule of practice to which I referred during the hearing of the appeal, and to which I have made reference earlier in this judgment, which appears on page 1405 of the White Book for 1931. The attention of the Judge should have been drawn to this matter, and special directions obtained from him as to how such reserved costs should be dealt with. This was not done, and that is the explanation for the learned Judge having failed to deal with this matter. I think as to the costs of the application to fix the rate of interest to be credited to the respondent in these accounts, which I believe to be Summons No. 415, and of the hearing before the Chief Justice, and of the order made thereon, being the order of 29th August, 1929, both parties should be at liberty to present bills for taxation as between solicitor and client,

and the costs as taxed should be paid out of the $1.525– standing in Court to the credit of this suit.

With regard to the question of the application to the Court to allow commission to the appellants I should have thought this a necessary application, and, if I felt free to deal with the costs of the application, I think that the same order should be made here as in the case of the question of interest. But the position there is not the same. By the order of the 31st March, 1930, which fixed the amount of commission to be allowed to the appellants, the costs of and incidental to the application were ordered by the learned Chief Justice to be costs in the cause. No appeal was preferred against this order and in my humble opinion this Court has now no power to interfere with that order, and as the costs of that application have been ordered to form part of the costs in the cause these must fall within the order dealing with the general costs of the action since the order of the 19th day of July, 1922.

There remains only to consider the question as to how the sum of $1,525.05 standing in Court to the credit of this suit should be dealt with. The order as to the costs of the application to the Court upon the question of interest will reduce the amount, but the balance left after paying those costs should be dealt with.

Upon this question our attention was directed to the submission of counsel for the respondent on the 9th August last before the learned Judge below when he submitted that the funds in Court did not belong to the respondent who has no right to them.

This submission was a submission on a point of law, and is not binding upon the respondent.

The judgment appealed against directs that the sum standing in Court to the credit of the suit be paid to the respondent in part payment of the costs of the action awarded to him by the judgment. This order predicates that the sum in Court was the property of the defendants, but in this view I am unable to agree. The balance which will ultimately be left in Court to the credit of this suit is the balance of the estate of the testator, which will belong as to two-thirds to the respondent, and as to one-third to the estate of Chan Chye Eng Neo, deceased, and such balance should be dealt with accordingly.

As to the costs of the appeal the appellants have succeeded to the extent of securing a partial reversal of the judgment below, by which they were ordered to pay the whole of the costs of the respondent, but they have failed in their appeal in so far as they sought an order that the respondent do pay their costs.

I propose that the order of this Court be that the appellants do recover against the respondent one-third only of their costs of this appeal.

In my opinion the appellants have failed to make out a case for severing their defences. and upon taxation of costs awarded to them by this judgment the appellants will be entitled to recover one set of costs only between them.

In working out this judgment the parties will be entitled to set off costs directed to be paid by the one party to the other.

MUDIE, J.—It is clear that plaintiffs are entitled to the costs of the action up to the date of the judgment. The defendants who are trustees, by their letter of the 9th April, 1921. categorically refused the legitimate request of the plaintiffs, their *cestui que trustent* for accounts. The plaintiffs were compelled to bring the action to enforce their right and they are therefore entitled to recover their costs from the defendants.

The position after judgment is not so clear. The general rule is that trustees are entitled to be reimbursed all costs properly incurred by them. The costs of the application for remuneration and of the application to determine the rate of interest on uninvested balances in their hands are within the rule. There can be no doubt that they are entitled to have the costs of these applications taxed as between solicitor and client and paid out of the estate. The interests of both parties are identical as far as these applications are concerned, and they can only be allowed one set of costs in respect of them.

The remainder of the proceedings before the Registrar present some difficulty. The accounts filed by the defendants is not in proper form, and does not furnish particulars which show what has been done with the assets of the estate. The finding of the learned trial Judge as to this is that "the defendants kept most inadequate accounts necessitating very prolonged accounts and inquiries by the Registrar." The costs of the proceedings before the Registrar are undoubtedly due to the failure of the trustees to discharge their duty of filing a proper account. They are not entitled therefore, in my opinion, to be reimbursed the costs arising out of and incidental to these proceedings. The accounts, however, are substantially correct. There has not been that gross misconduct which would justify an order to pay the costs of the other side. I think the proper order with regard to these proceedings is that each party pay his own costs.

In my opinion the appeal should be allowed with costs. The plaintiffs should have the costs of the action, as between party and party, up to judgment. The defendants should have the costs of the two interlocutory applications as between solicitor and client out of the estate, but restricted to one set of costs. Each party should pay his own costs of the remainder of the proceedings.

Order Accordingly.

Solicitors for the Appellants (Defendants)
Drew & Napier.

Solicitors for the Respondent (Plaintiff)
Chan & Eber.

END OF THE STRAITS SETTLEMENTS OFFICIAL REPORTS.